

INDEX

| | |
|--------------------------|------|
| Opinions below | Page |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statement | 2 |
| Argument | 2 |
| Conclusion | 9 |
| | 11 |

CITATIONS

Cases:

| | |
|--|----|
| <i>Clark v. Uebersee-Finanz Korporation, A. G.</i> , 332 U. S. 480 | 3 |
| <i>Comstock v. Group of Institutional Investors</i> , 335 U. S. 211 | 10 |
| <i>General Talking Pictures Corp. v. Western Electric Co.</i> , 304 U. S. 175 | 10 |
| <i>Oyama v. California</i> , 332 U. S. 633 | 9 |
| <i>Standard Oil Co. v. Clark</i> , 163 F. 2d 917, certiorari denied, 333 U. S. 873 | 9 |
| <i>Stoeck v. Wallace</i> , 255 U. S. 239 | 9 |
| <i>Sturchler v. Hicks</i> , 17 F. 2d 321 | 9 |
| <i>Thorsch v. Miller</i> , 5 F. 2d 118 | 9 |
| <i>United States v. Chemical Foundation</i> , 272 U. S. 1 | 10 |
| <i>United States v. Johnston</i> , 268 U. S. 220 | 10 |
| <i>Von Zedtwitz v. Sutherland</i> , 26 F. 2d 525 | 9 |

Statutes:

Trading With the Enemy Act, 40 Stat. 411, as amended (50 U.S.C. App. § 1 et seq.):

| | |
|-----------------|------|
| Sec. 5(b) | 7 |
| Sec. 7(c) | 3 |
| Sec. 9(a) | 2, 9 |

Miscellaneous:

| | |
|--|---|
| Hawaii Revised Laws (1945), Section 12757 | 3 |
| Executive Order No. 9788, Oct. 15, 1946, 11 F.R. 11981 | 2 |
| Executive Order No. 8389, April 10, 1940, 5 F.R. 1400 | 7 |
| Federal Rule of Civil Procedure No. 52(a) | 9 |
| Vesting Order No. 1756, 8 F.R. 10834 | 5 |
| Vesting Order No. 7939, 12 F.R. 153 | 5 |



In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 659

KANAME FUJINO, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED
STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 537-541) is reported at 172 F. 2d 384. The opinion of the District Court (R. 49-60) is reported at 71 F. Supp. 1.

JURISDICTION

The judgment of the Court of Appeals was entered January 31, 1949 (R. 542). The petition for writ of certiorari was filed March 21,

1949. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTION PRESENTED

Whether there is substantial evidence to support the findings of both courts below that the purported gift of real property to petitioner, an American citizen, by his Japanese father did not transfer beneficial ownership.

STATEMENT

This is a suit brought by petitioner, an American citizen, under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 419, as amended (50 U.S.C. App. § 9(a)), to recover six parcels of land in Hawaii which were vested by the Alien Property Custodian¹ pursuant to the Trading With the Enemy Act.

The District Court, after trial, entered judgment dismissing the complaint (R. 60-62). It found (R. 54-55):

Although record title to the six parcels of land stood in plaintiff's name, he did not have or purport to exercise complete and absolute ownership of the property. Notwithstanding the deed, plaintiff's father, the grantor, has, through his attorneys in fact and personally, retained control and the beneficial ownership

¹ By Executive Order No. 9788, October 15, 1946, 11 F.R. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the term "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

of the land. In holding the record title to the land, plaintiff has acted for and in behalf of his father and has been controlled by him.

And it concluded that the property in suit was "property 'owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of, an enemy' (Yotaro Fujino)" within the meaning of Section 7(c) of the Trading With the Enemy Act (R. 59) and that "plaintiff has no 'interest, right or title' in the real property within the meaning of Section 9(a) of the Act" (R. 60).

The Court of Appeals affirmed. It said (R. 540):

The District Court found that, although the record title stood in appellant's name, the beneficial ownership of the property was retained by Yotaro, and that, in holding the record title, appellant acted for and on behalf of Yotaro and was controlled by him. Thus, in effect, the record title was found to be a sham. The findings are supported by substantial evidence, are not clearly erroneous and hence are accepted by us as correct.²

² The Court of Appeals accordingly found it unnecessary to pass on two other grounds of decision relied upon by the District Court: (a) that the deed of gift of the land was formally defective because the asserted authority of the persons executing it was evidenced by a recorded power of attorney, and the deed was therefore not binding on third parties under the laws of Hawaii (Rev. Laws, 1945 § 12757) (R. 55-57); and (b) that the plaintiff was a "national" of Japan because controlled by and acting for and on behalf of his father and hence not entitled to recover in a suit under Section 9 (a) (R. 59). Cf. *Clark v. Uebersee-Finanz Korporation, A. G.*, 332 U.S. 480.

The evidence relating to this finding of continuing beneficial ownership in the enemy father may be thus summarized:

Petitioner's father, Yotaro Fujino (hereinafter referred to as Yotaro), was a citizen of Japan and resided in Japan continuously since 1935 (Fdg. 6, R. 50; R. 73, 258). Prior to 1935, while living in the Territory of Hawaii, he was the owner and sole proprietor of a Hawaiian business, the Oahu Junk Company (Fdg. 10, R. 52; R. 71). The facilities of the business were located on at least four and possibly five of the six parcels of land here involved (Fdg. 11, R. 53; R. 72, 122-123, 157). The land and structures thereon were regarded as property of the business (R. 391) and were necessary and indispensable to its conduct and operation (Fdg. 11, R. 53; R. 309).

Between April and July 1940, Mr. Robert Murakami, Yotaro's attorney in Hawaii (R. 71, 102), was in Japan (R. 82). He and Yotaro then formulated plans for the disposition of Yotaro's Hawaiian property, including his business and the real property here in suit (R. 83). Among the factors which motivated these discussions were "the strained relationship between the United States and Japan" (Fdg. 7, R. 51; R. 117-118) and the fact that if Yotaro should die intestate, his personal property would probably

go under Japanese law to collateral heirs rather than to his children (R. 84-87).³

It was decided that the business, exclusive of the real property on which it was located, should be incorporated, that substantial stock holdings should be placed in the names of Yotaro's wife and three children, and that a deed of gift of the land to the petitioner should be executed (R. 87-89).

These plans were subsequently carried out by Murakami and by Yotaro's trusted business agents, Tsuda and Tsutsumi, pursuant to instructions from Yotaro (R. 120, 270-271, 294-295). The business was incorporated in November 1940 (D. Ex. 4, R. 449-454; Pl. Ex. D, R. 468-478). Upon the issuance of shares to petitioner and his sisters, they gave Yotaro notes representing the par value of the shares and pledged the shares as security (R. 87-88, 118-120, 178-179, 270-271). This was done in order to carry out Yotaro's repeatedly expressed desire to retain "parental control" over the business (R. 271, 295, 383).⁴ In March 1941 the agents, purporting to act under powers of attorney from Yotaro and his wife, executed a deed of gift of the land to the petitioner (Pl. Ex. H, R. 501-509). Shortly

³ It was believed that the real property in Hawaii would go under Hawaiian law to his children equally (R. 84), and Yotaro expressed the desire that his son should inherit it under the Japanese principle of primogeniture (R. 88).

⁴ The Custodian has vested the entire capital stock of the Oahu Junk Company as the property of nationals of a designated enemy country. Vesting Order No. 1756, 8 F.R. 10834; Vesting Order No. 7939, 12 F. R. 153. No claims for the return of this stock have yet been filed with the Custodian.

prior to its execution, however, the agents had mortgaged the land as security for an indebtedness of the corporation (Pl. Ex. G, R. 488-500; R. 97-99; 125-128).

At the time of the formulation and execution of these plans, petitioner was twenty-one years old and had been living for several years with his father in Japan (R. 174). Nevertheless, he did not participate in any of the discussions concerning them, and his approval of the various acts done was apparently never deemed necessary (R. 114-115). His father instructed him to execute a power of attorney in favor of the agents so that they could effectuate the pledge of the shares issued him, and on his return to Hawaii in May 1941 the agents instructed him to endorse the mortgage note encumbering the land; in each case he complied without question (R. 178-179, 211).

After the incorporation, as before, the business continued to be managed by Yotaro's agents acting pursuant to instructions received by letter and cable from Yotaro (R. 316-317, 320-1; D. Ex. 5-A, 7-A, 8-A, 9, R. 455-458; Pl. Ex. L-1, M-1, O, Q, R, R. 515-18, 525, 527, 528). Petitioner testified that upon his return to Hawaii, although he was elected president of the corporation at his father's instructions (R. 316-317), he "had nothing to do with the management of the business at all." (R. 185). His intention upon returning to Hawaii was to enter into a four year course of study at the Uni-

versity of Hawaii (R. 183). At least until the spring of 1943 he studied at the University and in his spare time would "help out" at the store by serving as clerk or bookkeeper (R. 212). Petitioner further testified that before he left Japan his father had said, referring to his Hawaiian interests generally, that "eventually he will * * * give it all to me," but that for the present "since I was going to school, and I did not show my merits yet, so he told me to study hard and when I come back, after I go to school, help in that store." (R. 180; see also 151, 229).

Despite the fact that the land on which the corporation's facilities were located was not conveyed to the corporation, but was purportedly given to petitioner, no one doubted that the corporation would be able to continue using it (R. 309-310, 344-346). No written lease was thought necessary (R. 188-189). Not only did petitioner not ask any rental, but he testified that he had had no intention of demanding a rental during the four years that he planned to attend the University of Hawaii (R. 241-242; see also 278, 302). Nevertheless, within a month after the "freezing," on July 26, 1941, of the accounts of Yofaro and of the Oahu Junk Company, Ltd., pursuant to Section 5(b) of the Trading With the Enemy Act and Executive Order 8389, as amended, the business agents suggested to petitioner that the corporation pay rental for the land, beginning retroactively with the month of March

1941, and at the rate of \$300 a month (R. 185-186, 204-205, 298-302).⁵

The agents further instructed him to start a checking account with the rental payments received (R. 237, 240), which he did (R. 239). Petitioner testified that he and his father's agents discussed the effect of the freezing at the same time (R. 240, 300-301) and said that "it could be" that the freezing order affected the decision that he should open a checking account (R. 241). The funds in this newly established account were used for such family purposes as payment for petitioner's schooling (R. 186), provision for the needs of his sisters (R. 189, 213), the giving of a \$500 wedding present to an employee of the corporation (R. 190-191, 226-227) and the payment of his father's tax obligations (R. 244-246, 327-328). The wedding present and the tax payment would have been made by the corporation had its funds not been frozen (R. 327-329). In several cases petitioner received express instructions from his father or his father's agents as to the use to be made of the funds (R. 192-195). He testified further that in general he felt obligated to use any funds received from the land to satisfy any obligations which his father would have met had he been present (R. 190).

⁵ Although Tsuda testified that the rental was "somewhat cheap" (R. 278), petitioner accepted the suggested figure without question (R. 185, 189, 204).

ARGUMENT

To recover under Section 9(a) of the Trading With the Enemy Act, the plaintiff must establish that he was the owner of the property prior to vesting.⁶ It is well settled that possession of record title is not enough; the Trading With the Enemy Act is concerned not with formalities of record but with "beneficial ownership." *Stoehr v. Wallace*, 255 U.S. 239, 251.⁷ Under the Act formal transfers which "made no substantial change in the relevant property interests of the parties" will be disregarded. *Standard Oil Co. v. Clark*, 163 F. 2d 917, 923 (C.A. 2), certiorari denied, 333 U.S. 873. Both courts below have found that, despite the transfer of record title, the enemy father continued to control the use and to retain the beneficial enjoyment of the land in suit. This finding, far from being "clearly erroneous" (Federal Rules of Civil Procedure, Rule 52(a)), is abundantly supported by the record. In any event, no issue of general im-

⁶ It is settled that the burden of proof is on the plaintiff. *Von Zedtwitz v. Sutherland*, 26 F. 2d 525, 526 (C.A. D.C.); *Thorsch v. Miller*, 5 F. 2d 118, 122-3 (C.A. D.C.); *Sturchler v. Hicks*, 17 F. 2d 321, 322 (E.D. N.Y.). Petitioner relies on *Oyama v. California*, 332 U.S. 633, 644, in this regard. That case is clearly irrelevant; it held only that a heavier burden of proof could not be placed upon American citizens of Japanese ancestry than upon those of American ancestry. Here no heavier burden has been placed on petitioner than on any other plaintiff under Section 9(a).

⁷ It is not necessary that the record disclose a purpose to "cloak" the continuing enemy ownership; the test is the continued existence of beneficial ownership in an enemy. *Stoehr v. Wallace*, *supra*.

portance is presented. It is settled that the Court will regard "concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178; *United States v. Chemical Foundation*, 272 U.S. 1, 14; *United States v. Johnston*, 268 U.S. 220, 227.⁸

Petitioner's remaining contentions are based on the erroneous premise that he was the owner of the land at the time of vesting. Thus, he seeks (Pet. 7) to present the questions whether "the property of a citizen of the United States" can be "appropriated" by the Custodian under certain circumstances; whether in a suit under Section 9(a) the plaintiff should be required to prove anything more than his interest, right or title,

⁸ Plaintiff seeks to escape the force of the "two-court rule" by asserting that the Court of Appeals misconstrued the District Court's findings. But the District Court expressly found that the enemy father retained control and the beneficial ownership of the land. (Fdg. 15, R. 55).

It is true that the District Court, in its informal "comment" on the findings, appeared to emphasize its conclusion of law that the deed of gift was not effective against the Custodian because executed by attorneys in fact whose power to execute it was not recorded in conformity with Hawaiian law (R. 55-57). But the text of Finding 15, quoted in part above, shows that this formal defect was only an alternative ground for the conclusion that the father retained the beneficial ownership. Moreover, this ground of local law was not rejected by the Court of Appeals and the petition raises no contention that the District Court's decision in this respect is in conflict with Hawaiian law. Accordingly, this holding affords an independent ground in support of the decision below.

and his non-enemy status; and whether the action of the Custodian "appropriating petitioner's property" amounts to a denial of due process of law under the Fifth Amendment. The courts below rejected the premise on which each of these questions is based by holding that the petitioner was not the owner of the land prior to vesting; accordingly, none of these questions is presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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